YAP YOO LICK

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CRIMINAL APPLICATION NO. 3/1983]
19 JULY 1983

CONSTITUTIONAL LAW: *Right to consult and be defended by legal practitioner of own choice - Restricted Residence Enactment (Cap. 39) Section 2(ii) - Meaning of enquiry after arrest - Federal Constitution art. 5(3).*

The applicant in this case had been arrested in Johor Bahru under the Restricted Residence Enactment. His solicitors wrote to the Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri requesting for an enquiry in respect of the allegation against him. The Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri in writing replied that no enquiry would be held. An order restricting the applicant's residence was issued. The issues before the Court were whether the applicant was given an opportunity to be heard and was the applicant denied the right of enquiry thus contravening the rules of natural justice.

Held:

[1] On the construction of s. 2(ii) of the Restricted Residence Enactment an enquiry after arrest is optional.

[2] Written representation from the applicant to the Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri before the Order was issued and reply from the Authorities are tantamount to holding an enquiry.

[3] Provision of cl. 3 of Art. 5 of the Constitution must be read into the provisions of the Restricted Residence Enactment.

[Application dismissed.]

Cases referred to:
Assa Singh v. Mentri Besar, Johor [1969] 2 MLJ 30

Legislation referred to:
Federal Constitution, art. 5 cl. 3
Restricted Residence Enactment (FMS Cap 39) s. 2(ii)

For the applicant - R.K. Menon; M/s. R.K. Menon & Co.
For the respondents - Zaki b. Tun Azmi, SFC

JUDGMENT

Mohd. Yusoff Mohamed J:

This is a motion for the issue of a Writ of Habeas Corpus against the respondents, Menteri Hal Ehwal Dalam Negeri, Malaysia and the Chief Police Officer, Trengganu requiring that the applicant be produced before the Court and to set him at liberty on the ground that restricted order issued against him under the Restricted Residence Enactment Cap. 39 was unlawful and unconstitutional.

His affidavit in support of the motion states that he was arrested in Johor Bahru on 9 November 1982 and detained in Johor prison. On 16 November 1982, his solicitor wrote to the Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri requesting for an enquiry in respect of the allegation against him. On 16 December 1982 a reply was received from the Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri stating that no enquiry would be held and on 1 December 1982, the applicant was served with the order restricting his residence at Bandaran Kuala Brang, Daerah Ulu Trengganu.

The applicant's main contention is that he was given no opportunity of being heard and that he was denied the right of enquiry in order to present his case, contravening the rules of natural justice.

At the hearing, his learned Counsel argued that it is imperative that the Minister in exercising his powers under s. 2 of the Restricted Residence Enactment which is *quasi-judicial* in nature to hold an enquiry before issuing the order. He referred to the *Words and Phrases legally Defined,* Vol. 3 by John B. Saunders as his authority and contended that the words "may be deemed necessary" to be found in s. 2(ii) of the Restricted Residence Enactment should be construed as "shall ....." Again in referring to Art. 5 of the Federal Constitution, his learned Counsel also contended that the words "shall be allowed to consult and be defended by a legal practitioner of his choice" in cl. 3 (of the Article) would seem that an enquiry was envisaged, an that the word "defended" referred to in the same Clause would deem that an enquiry was to be held in order that the applicant would be able to defend himself.

This contention requiring enquiry before an order under s. 2(ii) of the Restricted Residence Enactment is not new. It has been canvassed and answered in *Assa Singh v. Mentri Besar, Johor* [1969] 2 MLJ 30 by H.T. Ong CJ, (Malaya), Suffian and Gill FJJ., as they then were. On the construction of s. 2(ii) while Suffian FJ found that an enquiry after arrest is optional p. 37H, Ong CJ and Gill FJ would seem to be in agreement that a detainee should be given an opportunity to make representation and that such a representation would be sufficient if made in writing, pp. 35(1) and 47(A).

On the facts of the case as adverted to in the applicant's affidavit, his learned Counsel had made written representation on his behalf to the Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri and from the exhibit at "YYL7" it would appear that the applicant had himself given a statement to the Authorities before the order was issued and from the affidavit in opposition filed by Ketua Setiausaha, Kementerian Hal Ehwal Dalam Negeri dated 2 June 1983, it would also appear that the applicant's appeal had been considered by the Minister and that the Minister was satisfied in making the order. It is apparent that from this affidavit, opportunity had been given for the applicant to be heard which is tantamount to holding an enquiry.

On the constitutional guarantee in cl. (3) of Art. 5 of Federal Constitution, Suffian FJ has this to say at p. 40 C-F:-

> But I see nothing in the Article which gives him a right to an enquiry. All that cl. (3) of Art. 5 says is that he shall be allowed to consult and be defended by a legal practitioner of his choice. To infer from this that he is entitled to an enquiry is as absurd as inferring from my right to defend myself with my fists that I am entitled to be attacked.
>
> Clause (1) of Art. 5 merely states that no person shall be deprived of his personal liberty save in accordance with law. It does not say that no person shall be deprived of his personal liberty save after an enquiry. I yield to no one in my concern for the liberty of the subject,

but if the makers of the Constitution had intended to alter the pre-Merdeka law (which may authorise the detention of any person without giving him the right to an enquiry), they would have used explicit language.

I am not only in agreement with these findings of the Federal Court but I am also bound by them. Applicant was not condemned without being heard. His representation and his appeal were considered by the minister. These were sufficient enquiries. In this result I dismissed this motion.

Also found at [1984] 1 CLJ 324